No. 11878.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JENNIE WUCHNER,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the ESTATE OF CHARLES E. HILL, doing business as HILL MACHINE TOOLS,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Judges of the United States Court of Appeals, for the Ninth Circuit:

Your petitioner, George T. Goggin (hereinafter referred to as "trustee"), as trustee in bankruptcy of the estate of Charles E. Hill, doing business as Hill Machine Tools, and appellee herein, respectfully petitions the above entitled Court for a rehearing in the above entitled case, the judgment of this Court having been entered herein on February 4, 1949, with a written opinion by Judge Stephens, after a hearing before Judge Mathews, Judge Stephens, and District Judge Driver. The grounds upon which this petition for rehearing is based are:

A. The opinion of the Court contains an inaccurate statement of facts.

B. The opinion of the Court contains, and the judgment which the Bankruptcy Court is instructed to enter is based upon, an interpretation of the law of the state of California which is in conflict with the controlling judicial decisions of the courts of that state.

C. The order of this Court enforces a forfeiture against the trustee in bankruptcy, without permitting him to apply to the Bankruptcy Court for relief, contrary to the California statutes and case law and contrary also to the recognized equitable nature of bankruptcy proceedings.

These matters appeared for the first time in the opinion of the Court, and therefore no opportunity was heretofore available for counsel to set forth their views thereon.

I.

The Facts.

In the statement of facts appearing in the opinion of the Court there are certain inaccuracies which we call to the Court's attention for the reason that a reading of the opinion might indicate that the correct facts would, on the theory of the Court stated in its opinion, have produced a different result. Neither party to the appeal pointed out the correct facts (which are hereinafter mentioned) in their briefs or in the oral argument, for the reason, presumably, that these facts were felt by both sides to have been conceded.

(a) Throughout the opinion it is intimated that Henry F. Poyet, president of the Angelus Escrow Service Corporation, was an apparent stranger to the transaction between the parties. In this connection we respectfully direct the Court's attention to the following portions of the record which indicate that Mr. Poyet, instead of

being a stranger to the transaction, was the attorney for Mr. and Mrs. Hill (Mr. Hill being the bankrupt herein).

Finding IV of the Referee [Tr. 39], which was adopted by the District Court on review, was to the effect that when the tender was made [Trustee's Exhibit No. 4] it was made by the bankrupt "through his attorney and agent in fact, to-wit, Henry Poyet." [Tr. 39.] Objections to the findings of fact were filed by the appellant before the Referee. No objection was made to the quoted findings. In fact this finding was expressly admitted as being proper by the appellant in her objections to the proposed findings [Tr. 32] when appellant states "there was an admitted offer by the attorney, to-wit, Henry Poyet." [See, also, Tr. 30.]

Moreover, the finding was supported by substantial evidence and, as the record shows, no contradictory evidence was offered. The record discloses that Mr. Poyet was the attorney of record for the bankrupt and for Mrs. Hill throughout this proceeding. [Tr. 9, 74.] Mr. Poyet testified during the trial of the matter to the effect that he was acting as attorney for Mr. Hill during the month of February, 1946. [Tr. 110.] The appellant knew at the time the tender was made that Mr. Poyet was acting as attorney, as is indicated by the reply of the appellant to the letter with which Mr. Poyet sent the escrow instructions, set forth as Trustee's Exhibit No. 4, in which Mr. Poyet is addressed as "Attorney-at-law" [Tr. 115] notwithstanding the fact that the letter enclosing the escrow instructions was signed by Mr. Poyet as president of the Angelus Escrow Service Company. [Tr. 116.]

We feel that the foregoing references to the record demonstrate conclusively that Mr. Poyet at all times herein

was acting as attorney for the bankrupt, the vendee under the installment contract involved.

Upon receipt of Mrs. Wuchner's notice to the effect that she exercised her option to declare the entire balance of principal and interest due under the contract Mr. Poyet's letter enclosing the escrow instructions was sent to Mrs. Wuchner informing Mrs. Wuchner that there was on deposit the full amount of her demand. Mr. Poyet's letter was dated February 11, 1946 and was in reply to the notice dated February 5, 1946. The notice purporting to declare a forfeiture was dated February 8, 1946.

(b) In its opinion the Court referred to the letter of Mr. Poyet dated February 11, 1946, enclosing the escrow instructions in the following manner on page 12 of its slipsheet opinion: "We hold that the attempted payment of the unpaid contract price was abortive. No other attempt to conform to the contract was ever made." In connection with the second quoted sentence it is notable that on June 28, 1946 the trustee in bankruptcy made a tender to Mrs. Wuchner of the balance of the purchase price with all accrued interest thereon, which fact is recognized by the Court in its slipsheet opinion on page 4 thereof when it is stated "on June 8, 1946, the balance of the purchase price with accrued interest was tendered Mrs. Wuchner by the trustee, and on July 1, she rejected the tender."

(c) At this point it appears advisable, though possibly out of sequence, to discuss the conclusion of this Court that the tender made on behalf of Mr. Hill by Mr. Poyet was an invalid tender by reason of the fact that the conditions therein contained and the conditions in the separate but related escrow between Frank Bruno, Teddy Berg and

Mr. Hill were not contemplated by the contract between Mr. Hill and Mrs. Wuchner and that therefore the subsequent declaration of forfeiture of Mrs. Wuchner had the effect of foreclosing all of the vendee's right under the contract. In this respect the Court indicates that the escrow instructions by the terms of which Mrs. Wuchner would be required to deposit a deed and a policy of title insurance before she received the money due her was a requirement beyond the terms of the contract. Petitioner respectfully submits that this view is not in accord with the contract of the parties providing that "the said seller on receiving full payment, at the time and in the manner above mentioned, agrees to deliver to the said buyer his policy of title insurance, showing the title to said property to be vested in the seller, free of encumbrance except as above stated and to execute and deliver to the said buyer, or assigns, a good and sufficient deed of grant, bargain and sale." [Tr. 98.] This provision of the contract would seem to demonstrate that the parties expressly contracted that the seller should give the buyer, upon payment of the price, a policy of title insurance and a deed The California cases to be discussed below demonstrate that these become concurrent conditions when the purchase price becomes due either by lapse of time or by exercise of the option contained in the acceleration clause.

The quoted provision of the contract is, we think, an answer to the fact upon which the Court relied most heavily in its opinion that Mr. Hill had assigned his rights under the contract to two apparent strangers, Bruno and Berg. The quoted provision of the contract clearly contemplates that the buyer would have the right to transfer his interest in the contract in which event the seller would execute a deed to "buyer, or assigns."

(d) Considerable stress is given in the opinion to the various other provisions of the escrow instructions. At this point we desire to call the Court's attention to the discussion in appellee's brief on pages 27 through 31 where it is pointed out that, under the statutory law of the State of California as interpreted and applied by the controlling decisions of the courts of that state, all objections to tender are waived unless the objections are made at the time of tender. (California Civil Code, Section 1501; Code of Civil Procedure, Section 2076.) There is nothing in the record to show that the appellant at any time made any objection to the tender.

II.
The Law.

Certain of the factual points hereinabove discussed necessarily involve questions of law, but petitioner has reserved for this portion of his petition those instances where, it is respectfully submitted, the opinion of this Court departs most fundamentally from established principles of California law.

Although it might be appropriate here to discuss the compelling doctrine of *Erie Railroad Co. v. Tomkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, petitioner feels that this would be unnecessary in the present case for the reasons that this Court is doubtless aware of the import of that case, and, further, that this Court has undertaken from the outset to apply the appropriate state law. Petitioner respectfully submits, however, that *Erie Railroad Co. v. Tomkins* is of extreme importance here since the opinion in this Court in the instant matter is in funda-

mental conflict with the settled California law in the following three respects:

A. It fails to recognize the election of remedies doctrine, the application of which would produce a holding that the appellant made a binding election by demanding the balance of the purchase price.

B. The notice of declaration of forfeiture was wholly ineffective by reason of appellant's failure to make a tender of a deed in connection therewith.

C. The Court failed to apply Section 3275 of the Civil Code of the State of California, which would require granting the vendee relief from the attempted forfeiture.

A. Election of Remedies. Inasmuch as this point was raised in appellee's brief it would not be proper for us in this petition to do more than to call the court's attention to the discussion appearing upon pages 23 to 25 of appellee's brief and the cases there cited. There it was pointed out that both by operation of law and by express provision of the contract involved in the instant case the appellant had the right either to declare a forfeiture or to demand the entire balance of the purchase price; she could not do both. This point is not discussed in the Court's opinion.

B. Tender of Deed. In footnote five of its opinion, this Court distinguishes the cases of *Boone v. Templeman,* 158 Cal. 290 and *Hayt v. Bentel,* 164 Cal. 680, which require the vendor to make a tender of a deed in order to effectively declare a forfeiture under a land installment contract where time is made of the essence, on the ground

that both of these cases involve situations where the vendor waited until the entire purchase price had become due by lapse of time under the contract. The distinction is stated as follows:

> "In the instant case the appellant acted under the terms of the contract and took advantage of her option. This distinguishes our case. The vendor did not allow the whole to become due by a mere lapse of time but acted within the terms of the contract, the consequences not being determined by law but by contract."[1]

Inasmuch as no such distinction was mentioned either in the briefs of the parties herein or during oral argument of counsel this petition is our first opportunity to point out that no such distinction is recognized under the law of the State of California.

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[1]In the instant case it would seem that at the time of the attempted declaration of forfeiture all the installment payments had become due under the contract by lapse of time. $1500.00 was to have been paid before the vendee was entitled to a deed. $349.38 was paid upon execution of the contract and $200.00 was to have been paid each month thereafter commencing with the month of July, 1945. As stated on page 2 of the slipsheet opinion, "The first two monthly installments were paid. After four months had elapsed without further payment Mrs. Wuchner . . ." declared the entire purchase price due and later declared the contract forfeited and cancelled. Thus $749.38 had been paid in compliance with the contract, and the four months' default of $200.00 each would have totalled $800.00, which added to the sums already paid would equal $1549.38—a sum in excess of that called for by the installment provisions of the contract.

In view of these facts it appears that even under the Court's interpretation of the California law as announced in footnote five of its opinion in the instant case the vendor would have had to tender a deed because all installments had become due under the contract by lapse of time. As pointed out in the text hereof, we place no particular reliance on this point because the California law recognizes no distinction such as that stated in footnote five to the Court's opinion.

The case of *Caspar Lumber Co. v. Stowell* (1940), 37 Cal. App. 2d 58, constitutes a specific holding that whether the entire balance of purchase price under an installment land contract (where time is of the essence) becomes due *either by lapse of time or pursuant to the vendor's option in the event of a default to declare the entire balance due,* the vendor must tender a deed in order to validly declare a forfeiture. In that case the contract was very similar to the one involved in the instant case. The plaintiff there was the vendor who sought to recover the balance of the purchase price due under the contract. The trial court sustained the defendant's (vendee's), demurrer to plaintiff's complaint and in affirming the sustaining of the demurrer the District Court of Appeal specifically ruled on the question of whether or not a tender was necessary where the vendor exercised his option to declare the entire balance of principal and interest due as he had a right to do under the contract in the event of a default, notwithstanding the fact that the contract had not as yet matured. In holding that the vendor must make a tender of a deed in connection with the demand pursuant to the acceleration clause the court refers to the case of *Boone v. Templeman, supra,* and quotes the language from the opinion quoted by the court in footnote five of its opinion to the instant case. Following that, the opinion states (37 Cal. App. 2d at 62):

> "Appellant seeks to confine the application of the rule to those cases in which 'the vendor waits until the maturity of the contract before filing suit'. Appellant cites and relies upon *Christian v. Johnson Const. Co.*, 161 Md. 87 (155 Atl. 181), as the only authority upon which the argument is founded that, when a vendor claims a default of the whole purchase

price under an acceleration clause, his suit to recover the balance due is not a suit to recover the instalments due, but an action for the breach, and that no tender is necessary. *The case stands alone and does not represent the California rule.* [Italics ours.]

"In case of breach by the vendee, the vendor may bring suit (1) for the instalments which are due; (2) for damages for the breach; (3) for specific performance; (4) to foreclose; or (5) to quiet title. The first two actions are at law, the last three in equity. A general offer to do equity, or a plea of readiness and willingness will excuse a plea of tender in a bill of equity. (26 R. C. L., p. 626.) This is on the principle that a court of equity once acquiring jurisdiction of the cause will assume full jurisdiction in order to do complete equity. But there is no such rule in respect to a pure action at law such as we have here. In such a case, where the obligation of the vendor is to convey upon payment of the full purchase price, the two conditions are dependent and concurrent. No other rule is possible. Paragraph IV of the contract of sale gives the vendor the option in case of any default of vendee, to claim the entire balance due, or to claim the rights of the vendee forfeited. The complaint pleads that the vendor elected to claim the entire purchase price, and the written notice to the vendee pleaded as an exhibit is to that effect. No forfeiture was attempted and none pleaded. The rights of the parties are plain—if the vendor recovers the full purchase price, the vendee is entitled to a conveyance of the property. We are not impressed with appellant's suggestion that respondent might not satisfy the judgment, and hence no tender would be necessary, or that respondent might sue to quiet title or sue in equity to compel appellant to execute a deed. The principle of the ruling cases is that where under

> a contract for the sale of real property calling for the payment of the purchase price in instalments, with an acceleration clause in event of nonpayment of any instalment, the vendor exercises the acceleration option and declares the whole amount due, the parties are in the same position as when the final payments become due by the lapse of time fixed in the contract. As above noted, the appellant herein did not claim a default or forfeiture, but demanded payment in full. Such a demand cannot put the vendee in default without a tender of a deed. (*Lemle v. Barry,* 181 Cal. 6, 10 [183 Pac. 148].)"

The rule stated by the California Supreme Court in *Boone v. Templeman,* to the effect that when all the payments are due a vendor *must* tender a deed as a condition to either an action for the price or a declaration of forfeiture, is unequivocal. The holding in the *Caspar Lumber Co.* case to the effect that the foregoing rule is equally applicable to contracts where the entire amount is due either by reason of lapse of time or by acceleration, is similarly unequivocal. In view of these cases, petitioner respectfully submits that under California law Mrs. Wuchner cannot be held to have placed the vendee in default.

C. Relief From Forfeiture. Courts of Bankruptcy are inherently courts of equity. As illustrative of this fact the Supreme Court of the United States made the following statement in *Pepper v. Litton,* 308 U. S. 295, 41 A. B. R. (N. S.) 279, at page 288:

> "Courts of bankruptcy are constituted by sections 1 and 2 of the Bankruptcy Act (30 Stat. 544) and by the latter section are invested 'with such jurisdiction at law and in equity as will enable them to exercise

> original jurisdiction in bankruptcy proceedings.' Consequently this court has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.' "

See, also:

> *Sec. & Exch. Comm. v. U. S. Realty & Imp. Co.*, 310 U. S. 434, 455-457, 42 A. B. R. (N. S.) 602, 617-619.

It is a fundamental maxim that "equity abhors forfeitures" and this is particularly true in any case in bankruptcy where the contemplated forfeiture would prejudice the rights of innocent creditors.

In bringing the foregoing basic principles to bear on the instant case, we find that this Court has enforced a forfeiture to the detriment of the trustee in bankruptcy who sought, for the benefit of the creditors of the bankrupt, to assert the rights of a vendee under a land installment contract. In addition, the order of this Court completely forecloses the right of the trustee, granted both by the California cases and statutory enactment, to apply to the bankruptcy court for relief from the forfeiture. It should be noted, preliminarily, that both the referee and the District Court ruled in favor of the trustee. Thus, they were convinced that no forfeiture should be allowed and that the trustee should be permitted to complete the contract. But even if the vendor were to be permitted to declare a forfeiture, is it not conclusively settled under California law that the trustee, vested with the rights of the vendee for the benefit of all his creditors, is equally to be permitted to apply to the trial court for relief from that forfeiture?

In a footnote to appellee's brief, on page 23 thereof, reference is made to a line of cases in the state of California allowing vendees under installment land contracts (where time is of the essence) relief from forfeiture pursuant to the provisions of Section 3275 of the Civil Code of the State of California. At that time we pointed out that that line of cases seemingly ignored the principle of the case of *Glock v. Howard & Wilson Colony Co.* (123 Cal. 1). It is notable, however, that the last case there cited, *Ebbert v. Mercantile Trust Co.* (1931), 213 Cal. 496, at pp. 500-501, made mention of *Glock v. Howard* but found it to be not controlling on the ground, *inter alia,* that Civil Code Section 3275 was not considered therein. We do not propose to re-argue that line of cases in this petition for rehearing but we take this opportunity to invite this Court's attention to two recent decisions of the California courts applying Section 3275 of the Civil Code and casting considerable doubt on the present validity of the rule of *Glock v. Howard & Wilson Colony Co., supra.* We feel that this is proper at this time in view of the fact that the two cases we shall mention herein were decided subsequent to the writing of the briefs and the oral argument in this case. These cases are particularly significant by reason of this Court's reliance on the case of *Troughton v. Eakle,* 58 Cal. App. 161 in its opinion. (Footnote 4 thereof, and the text in connection therewith.) In *Troughton v. Eakle,* the court, after stating the material quoted by this Court in footnote 4 of its opinion points out for the guidance of the trial court to which the case

was remanded the possible application of Section 3275 of the Civil Code in the following language (58 Cal. App. at 173):

> "At any rate, the courts are ready upon the slightest equitable consideration to relieve parties, upon such terms as may be just, from the results of a forfeiture. The principle is embodied in section 3275 of the Civil Code as follows: 'Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions he may be relieved therefrom, upon making a full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty.'
>
> "We see no reason why such relief might not be had in the present case as it does not fall within the exception. The plaintiffs made an effort to comply with their obligation, but, acting probably without legal advice, their effort was ineffective. Their complaint was framed, as we have seen, upon a different theory and it would be necessary to have it amended to justify the relief that we have suggested. We perceive no valid objection to such procedure and if that course be taken, the court can allow whatever is just and equitable in view of all the circumstances. (*McDonald v. Kingsbury,* 16 Cal. App. 244 [116 Pac. 380].)
>
> "We think the judgment should be reversed, and it is so ordered."

The case of *Gonzalez v. Hirose* (decided December 23, 1948), 33 A. C. 185, is an example of the Supreme Court of the State of California applying section 3275 of the Civil Code to give a defaulting vendee on an instalment land contract where time was of the essence relief from

forfeiture when the court reversed a judgment of the trial court quieting the title of the vendor's assignee to the real property there involved. The court relieved the vendee from the attempted forfeiture notwithstanding the fact that section 3275 of the Civil Code *was invoked for the first time on appeal.* The theory of granting relief to the vendee in this situation is stated as follows (33 A. C. at page 188):

> "In the agreement it was provided that time was of the essence, that default in payment would give the bank the option to declare a forfeiture of the defendant's rights and all interest in the land, and that a waiver of one restriction and condition should not be construed as a waiver of any succeeding breach or other provision of the agreement. Unquestionably the defendant defaulted. However, subsequent to the defaults the record shows a course of conduct by the bank which, during the years 1943 and 1944, credited payments on account of interest and principal without regard to the time factors. Although the parties had covenanted that a waiver of one breach would not waive a subsequent breach or other condition, it is clear that the bank had waived the time provision. Nevertheless the plaintiff, immediately upon becoming assignee of the bank's rights, gave notice that the defendant's rights were forfeited. Since the law looks unfavorably upon forfeitures, waiver of the time clause will be deemed to be a waiver of the forfeiture unless the time element is first reestablished by definite notice. (*Boone v. Templeman,* 158 Cal. 290 [110 P. 947, 139 Am. St. Rep. 126]; *City of Los Angeles v. Krutz,* 170 Cal. 344 [149 P. 580]; *McCartney v. Campbell,* 216 Cal. 715, 720 [16 P. 2d 729]; Rest., Contracts, §311.) Admittedly no such notice was given.

"The test as to when a party will be relieved from a forfeiture is stated by Pomeroy, Equity Jurisprudence (5th ed.), section 433, as follows: 'Wherever a penalty or a forfeiture is used merely to secure the payment of a debt, or the performance of some act, or the enjoyment of some right or benefit, equity, considering the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory, will relieve against such penalty or forfeiture by awarding compensation instead. . . . The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured.'

"The case before us plainly indicates that the purpose of the time and forfeiture clauses was merely to secure payment of the purchase price, that payment thereof would make the bank or its assignee whole; that since the time and the forfeiture clauses had been waived the defendant was entitled to a definite seasonable notice from the plaintiff of the reestablishment of those conditions with reasonable opportunity for compliance before the plaintiff could declare a forfeiture. Instead of affording the required notice the plaintiff, with knowledge of the circumstances gained by his business relationship with the defendants, sought to obtain an advantage and acquire the property for a figure far below its value and freed from the claims of the defendants. In the absence of the appropriate notice to comply with reestablished time conditions or of an offer by the plaintiff of a deed upon payment of the balance due, there was no breach of duty on the part of the defendant. Equitable principles apply in a quiet title action. (*O'Brien v. O'Brien,* 197 Cal. 577 [241 P. 861]), and the courts may grant relief against a for-

feiture in the absence of a breach of duty (Civ. Code, §3275; *Ebbert v. Mercantile Trust Co.,* 213 Cal. 496, 499 [2 P. 2d 776]; *McCormick v. Rossi,* 70 Cal. 474 [15 P. 35]; *Keller v. Lewis,* 53 Cal. 113).

"It is apparent, under the circumstances of this case, that the result would be unconscionable if the defendant be not afforded the relief requested. The unqualified judgment is therefore unsupported. The plaintiff is entitled only to a qualified judgment containing a provision that a deed be executed and delivered conveying title to the property to the defendant upon payment to the plaintiff of the amount due him, within such time as the trial court may deem to be reasonable.

"The judgment is reversed and the cause remanded for further preceedings consistent with this opinion."

All the justices of the California Supreme Court concurred in the opinion.

Finally in this connection we refer to a recent opinion of Justice Peters of the First District of the District Court of Appeal of the State of California in the case of *Barkis v. Scott* (decided January 18, 1949), 89 A. C. A. 778. Justice Peters reviewed the law of the State of California subsequent to *Glock v. Howard* and concludes that *Glock v. Howard* is of very doubtful authority today particularly in view of the fact that it overlooked section 3275 of the Civil Code and therefore cannot be interpreted as holding that the section is inapplicable (89 A. C. A. 784). We cannot single out any portion of the opinion of Justice Peters for quotation herein. We feel that the entire opinion constitutes a statement of the California law on the question and we respectfully request that it be considered in connection with this petition for rehearing. The District Court of Appeal on February 17, 1949,

denied a petition for rehearing on the case of *Barkis v. Scott*. We are unable to ascertain at this time whether or not a hearing has been requested in the California Supreme Court. All we desire to point out herein, in connection with the *Barkis* case, is that judgment of the trial court was there reversed which judgment forfeited the vendee's rights upon the basis of a finding that the vendee's "failure to meet said obligation . . . was grossly negligent and a wilful breach of duty."

The California Appellate Courts, in the *Gonzales* and *Barkis* cases, *supra,* compelled relief from forfeiture under California Civil Code, Section 3275; in other cases, such as *Troughton v. Eakle, supra,* the Appellate Court remanded the case for the trial court's decision as to the application of that section, but strongly implied that such relief should be granted. In the instant case, however, this Court has remanded the matter with directions *entirely foreclosing* the right of the trustee under California law to apply to the Bankruptcy Court for relief under California Civil Code, Section 3275. Thus, a trustee in bankruptcy is precluded from exercising, on behalf of the innocent creditors, the right that any ordinary vendee could exercise in the California courts; indeed, this right (relief from forfeiture under Civil Code, Section 3275) is of such overwhelming significance that the California Supreme Court has compelled its exercise when raised by the vendee for the first time on appeal after an adverse judgment in the trial court. Here the trustee was successful below and thus the reversal with directions appears to be particularly inequitable. The trustee has already tendered payment, and is still ready, willing and able to pay the entire balance of the purchase price with all accrued interest thereon.

Conclusion.

Petitioner is mindful that petitions for rehearing seldom meet with success, presumably for the reason that they are often mere rearguments after this Court has already studied the applicable law and facts and reached its decision. Nevertheless, we respectfully urge that this Court reconsider its opinion herein, perhaps *en banc,* in view of its sharp departures from well-settled California law and its grave inroads upon the equitable jurisdiction of the Bankruptcy Court. The instant opinion will serve as a block to all vendees who seek relief from forfeiture of installment land contracts; petitioner, however, is most concerned with the holding (without discussion) that a trustee is not entitled in the Federal Courts to the equitable relief afforded to any vendee in the State Courts by virtue of California Statute. We feel that not only the nature of bankruptcy proceedings, but *Erie Railroad Co. v. Tompkins, supra,* as well, strongly militate against such a result.

Finally, petitioner is concerned lest the opinion herein result in the same problem that for some time faced the California courts after the case of *Glock v. Howard, supra.* As shown above, the *Glock* case failed to mention Civil Code, Section 3275, and it took many years to reinstate the force of that statute which did no more than state a generally accepted equitable rule. Now relief under Civil Code, Section 3275, is assured by strong state court decisions. Should this Honorable Court, governed by state law, rule otherwise?

Wherefore, your petitioner prays that this petition for rehearing be granted in order that the case can be re-argued and reconsidered in the light of the correct facts and the applicable law.

Dated: March 4th, 1949.

Respectfully submitted,

GENDEL & CHICHESTER,
By MARTIN GENDEL,
Attorneys for Appellee and Petitioner.

Certificate of Counsel Under Rule 25.

I certify that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated: Los Angeles, California, March 4, 1949.

GENDEL & CHICHESTER,
By MARTIN GENDEL,
Attorneys for Appellee and Petitioner.